85-1676

Supreme Court, U.S.
FILED
APR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85 - _____

In The

Supreme Court of the United States

October Term, 1985

Elizabeth S. McKee and Deborah Gibbs,

Petitioners,

vs.

United States of America,

Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

NORMAN B. SMITH
Smith, Patterson, Follin,
Curtis, James and Harkavy
700 Southeastern Building
Greensboro, NC 27401
(919) 274-2992

Counsel of Record

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Should 26 U.S.C. Sec. 6702, imposing a civil penalty on frivolous tax returns, be construed not to extend to a return filed in good faith, and which contains all necessary information for the tax due to be assessed and collected, but which also contains a message protesting against military expenditures, thereby avoiding an injury to the constitutional protected interest of petitioning?

2. Does 26 U.S.C. Sec. 6702, imposing a civil penalty on frivolous tax returns, violate the First Amendment right to petition, when applied to a return filed in good faith, and which contains all necessary information for the tax due to be assessed and collected, but which also contains a message protesting against military expenditures?

PARTIES

The parties to this proceeding are the petitioners, Elizabeth S. McKee and Deborah Gibbs (plaintiffs below) and the respondent United States of America (defendant below).

TABLE OF CONTENTS

Questions Presented i

Parties ii

Table of Authorities v

Opinions Below 2

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 4

Reasons for Granting the Writ . . . 11

I. The Statute 26 U.S.C. Sec. 6702, Imposing a Civil Penalty on Frivilous Tax Returns, Should Be Construed Not to Extend to a Return Filed in Good Faith, and Which Contains All Necessary Information for the Tax Due to Be Assessed and Collected, But Which Also Contains a Message Protesting Against Military Expenditures, Thereby Avoiding an Injury to the Constitutionally Protected Interest of Petition . 11

II. The Statute 26 U.S.C. Sec. 6702, Imposing a Civil Penalty on Frivolous Tax Returns, Violates the First Amendment Right to Petition, When Applied to a Return Filed in Good Faith, and Which Contains All Necessary Information

for the Tax Due to Be Assessed and Collected, But Which Also Contains a Message Protesting Against Military Expenditures. . 16

1. The right to petition is independent of, and far broader than, the other First Amendment expressive rights, and this court should reconsider and reject the contrary implication in its decision last term of McDonald v. Smith 16

2. Even if the right to petition can be overcome by proof of bad faith, petitioners' conduct is protected since the trial court found as fact that they acted in good faith. . 45

Conclusion 48

TABLE OF AUTHORITIES

Cases

Ambrosius v. O'Farrell, 119 Ill.App. 265 (1905) 42

Baca v. Commissioner, 326 F.2d 189 (5th Cir. 1964) 15

Bradley v. United States, 410 U.S. 605 (1973) 38

Case of the Seven Bishops, 3 Celebrated Trials and Remarkable Cases of Criminal Jurisprudence 144, 12 Howell's State Trials 183 (1688) 26, 42 43

Crowell v. Benson, 285 U.S. 22 (1932) 16

Curtis v. Loether, 415 U.S. 189 (1974) 21

Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) 41, 46

Harris v. Huntington, 2 Tyler 129 (Vt., 1802) 21

Lake v. King, 1 Wms.Saund. 131, 85 Eng.Rep. 137 (1680) 21

McDonald v. Smith, ___ U.S. ____ (No. 84-476, June 19, 1985) . . 16, 17, 19, 20, 31, 38, 39, 40, 45, 47

Osborn v. Pennsylvania Delaware Service Station Dealers Assoc., 449 F.Supp. 553 (D.Del. 1980) . . 42

Rewis v. United States, 401 U.S. 808 (1971) 15

Smith v. Arkansas Highway Employees Local 1315, 441 U.S. 463 (1979) 46

Statutes

26 U.S.C. Sec. 6213(b) 13

26 U.S.C. Sec. 6213(g)(2) 13

26 U.S.C. Sec. 6702 . . . . . 3, 10, 11, 14, 16

26 U.S.C. Sec. 7422 5

28 U.S.C. Sec. 1254(1) 2

13 Car. II, Stat. I 43

1 Will. and Mar. Stat. 2 27

MISCELLANEOUS

1 Allen, J. W., English Political Thought 1603-1660 (1939) 43

Bailey, R.C., Popular Influence Upon Public Policy: Petitioning in Eighteenth Century Virginia (1979) 30

Brown, Ideas of Representation from Elizabeth to Charles II, 11 J. Mod.Hist. 23 (1939) 19

Coates, Some Observations on the Grand Remonstrance, 4 J.Mod.Hist. 1 (1932) 43, 44

Defoe, An English Garner: Later Stuart Tracts (G.A. Aitken ed. 1903) 28

Emden, C. S., The People and the Constitution (2d ed. 1959) . . . 25, 29, 43, 44, 45

Fraser, Public Petitioning and Parliament Before 1832, 46 History 195 (1961) 29, 30

Harvey, J., and Bather, L., The British Constitution (2d ed. 1969) 44, 45

Keir, D. L., The Constitutional History of Modern Britain Since 1485 (6th ed. 1960). . . . 19

Levy, L., Freedom of Speech and the Press in Early American History: Legacy of Suppression (1963) 31

Marsh, Documents of Liberty (1971) 22

McKechnie, Magna Carta (2d ed. (1914) 23

Poore, Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States 33

Schwartz, B., The Bill of Rights: A Documentary History (1971) . . 36, 37, 40

Siebert, F., Freedom of the Press in England 1476-1776 (1952) . . . 31

Smith, D., The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations (1971)(University Microfilms, unpublished thesis) 44

Smith, "Shall Make No Law Abridging . . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U.Cincinnati L.Rev. _____ (in press) 29

Somers, Jura Populi Anglicani or the Subjects' Right of Petitioning Set Forth (1701) 28

Thomson, M.A., Constitutional History of England 1642-1801 (1938) . . . 27

Thorpe, The Federal and State Constitutions, Colonial Charters and Their Organic Laws (1909) 33, 34

Von Holst, H., The Constitutional and Political History of the United States (1888) 44

Williams, D. H., A History of England (1967) 24

1 Annals of Congress 36, 39

1A C.C.H.Fed. Tax Guide Par. 15,001 (1985) 13

Colonial Laws of Massachusetts Reprinted from the Edition of 1672-90 (1887). 32, 33

2 The Debates in the Several State Conventions on the Adoption of the Constitution . . . 34

3 The Debates in the Several State Conventions on the Adoption of the Constitution 35

4 The Debates in the Several State Conventions on the Adoption of the Constitution 35

2 Documentary History of the Constitution of the United States 35

History of Congress Exhibiting a Classification of the Proceedings of the Senate and the House of Representatives from March 4, 1789, to March 3, 1793 . . . . . 37, 38

Internal Revenue Service, Statement of Procedural Rules Sec. 601.105(a) 13

Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, 1779-1780 . . . 33

1 Laws of the State of Delaware (1797) 33

4 Parl. Deb. (1st ser. Cobbett) (1669) 24

4 Parl.Hist. 25

5 Parl.Hist. 24, 28, 29, 43

32 Parl.Hist. 20

S.Rep.No. 494, 97th Cong. 2d Sess. 277 12

No. 85 - _____

In The

Supreme Court of the United States

October Term, 1985

Elizabeth S. McKee and Deborah Gibbs,

Petitioners,

vs.

United States of America,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit

entered in this cause on January 21, 1986.

OPINIONS BELOW

The decision of the court of appeals will be, but has not yet been, reported. A copy of the opinion of the court of appeals appears at pp. 1a-17a of this petition. The opinions of the district court are unreported and appear at pp. 18a-49a of this petition.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1986. This petition is filed within 90 days of the judgment of the court of appeals. This court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the Constitution

of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or adbriding the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

---

26 U.S.C. Sec. 6702:

Frivolous income tax return.

(a) Civil penalty. - If -

> (1) Any individual files what purports to be a return of the tax imposed by subtitle A but which -
>
> (A) does not contain information on which the substantial correctness of the self-assessment may be judged, or
>
> (B) contains information that on its face indicates that the self-assessment is substantially incorrect; and
>
> (2) The conduct referred to in paragraph (1) is due to -
>
> (A) a position which is frivolous, or
>
> (B) a desire (which appears on the purported return) to delay or impede the administration of federal income

tax law,

then such individual shall pay a penalty of $500.

(b) Penalty in addition to other penalties. - The penalty imposed by subsection (a) shall be in addition to any other penalty provided by law.

STATEMENT OF THE CASE

Petitioner Elizabeth S. McKee filed action in United States District Court for the Middle District of North Carolina against respondent on July 23, 1984, seeking refund of a penalty in the amount of $500 that it had assessed against her allegedly for filing a frivolous income tax return. Petitioner Deborah Gibbs commenced a similar action against respondent in the same court on September 4, 1984. Respondent filed motions to dismiss and for summary judgment in each case. By memorandum order and judgment dated December 17, 1984, the district

court granted respondent's motions in the case of petitioner Elizabeth S. McKee, and ordered dismissal of her action. By memorandum order and judgment dated February 26, 1985, the district court granted respondent's motions in the case of petitioner Deborah Gibbs, and ordered the dismissal of her action.

Petitioners took timely appeals to the United States Court of Appeals for the Fourth Circuit, where the two cases were consolidated for briefing and argument, and were decided as case no. 85-1015. On January 21, 1986, the court of appeals entered its opinion affirming the district court's dismissals in both cases.

The district court had jurisdiction of plaintiffs' cases by virtue of 26 U.S.C. Sec. 7422.

Petitioners filed their 1983 forms 1040, United States Individual Income Tax Return, in a timely manner. Each protested the use of tax money for military purposes, based on religious or conscientious objections.

Petitioner Elizabeth S. McKee's final entry on the tax return listed a refund due her in the amount of $1,447.37, which was the correct amount due based on proper calculations. However, petitioner McKee altered line 42 of the return which reads "foreign tax credit" to read "foreign war tax credit", and on that line claimed the sum of $561.66. The effect of claiming the credit would have been to reduce petitioner McKee's total tax by the amount of the credit, and to increase "taxes over-

paid" on line 65 by the same amount. However, she cancelled out this effect by indicating that the amount of the credit was not to be refunded or credited toward next year's taxes, but instead was "to be spent on social services".

Petitioner McKee is a member of the Quaker faith and subscribes to its tenets of opposing war and preparations for war. She estimated that 37 percent of the federal budget went toward military spending, which was the basis for claiming that same percentage of her tax liability as a tax "credit". Petitioner McKee stated that she took this action as a conscientious objection "to the manufacture and use of weapons of war" and the taking of her money "to pay for weapons, military forces, or research into yet more effective ways of killing

people, even if these are used only as a threat to coerce others into following policies set by our government." Petitioner McKee pointed out and explained what she had done in a letter to the Internal Revenue Service, which she attached to her tax return. Her letter continued by expressing a desire to see her tax money "spent on things that make for life: food, housing, education, child care, elderly care." In closing, she stated:

> On line 67, I noted that I want the 37 percent of my tax liability formerly allocated to war to be used for peace, for social services. I expect only the portion of my tax withholdings owed to me by computation of my deductions to be refunded to me personally, but I request that you channel these funds into life-giving and not death-dealing purposes.

The final entry on the tax return of petitioner Deborah Gibbs requested a

refund due in the amount of $399.83. On line 48 of the tax return which reads "total credits", she wrote in "CMTC Escrow Acct." [Conscience and Military Tax Campaign Escrow Account], and inserted the amount $248.80. The effect of claiming the credit was to reduce petitioner Gibbs' "total tax" on line 56 by the amount of the credit, and to increase "taxes overpaid" on line 65 by the same amount.

Petitioner Gibbs also attached a letter to her tax return addressed to the Internal Revenue Service explaining what she had done and why she had done it. She estimated that 40 percent of the federal budget went toward military spending and claimed a proportionate amount as a tax credit. Petitioner Gibbs stated that she took this action in

conscientious objection "to the placement of nuclear weapons in Europe, covert aid to Central America, and military adventures worldwide." She requested in her letter that this part of her tax money be "deposited in the Conscience and Military Tax Campaign Escrow Account for a world peace tax fund." Further she stated:

> This request is in no way an attempt to avoid my tax liability, nor is it undertaken lightly. It is an attempt in good faith to comply with my tax obligation without violating my most fundamental religious beliefs.

Respondent assessed $500 penalties against each petitioner under the provisions of 26 U.S.C. Sec. 6702 for allegedly filing frivolous tax returns. Each petitioner filed timely claim for refund. In her refund claim petitioner Gibbs specifically advanced the claim that Sec. 6702 violated her right to

"petition her government for redress of grievances" and other First Amendment rights. In due course petitioners' claims were disallowed by respondent, and the two civil actions for refund were timely instituted.

REASONS FOR GRANTING THE WRIT

I. THE STATUTE 26 U.S.C. SEC. 6702, IMPOSING A CIVIL PENALTY ON FRIVOLOUS TAX RETURNS, SHOULD BE CONSTRUED NOT TO EXTEND TO A RETURN FILED IN GOOD FAITH, AND WHICH CONTAINS ALL NECESSARY INFORMATION FOR THE TAX DUE TO BE ASSESSED AND COLLECTED, BUT WHICH ALSO CONTAINS A MESSAGE PROTESTING AGAINST MILITARY EXPENDITURES, THEREBY AVOIDING AN INJURY TO THE CONSTITUTIONALLY PROTECTED INTEREST OF PETITION.

By enacting 26 U.S.C. Sec. 6702, Congress intended to penalize tax returns "not designed to inform the Secretary of the filer's taxable income and not in processible form," or "in which insufficient information to calculate the tax is given," or where the Secretary is unable

to "assess and collect the tax immediately." S.Rep.No. 494, 97th Cong. 2d Sess. 277, 278 (reprinted in 1982 U.S. Code Cong.& Ad.News 781, 1023-25). Congress evinced special concern with curbing abuses brought about by advisors who induce taxpayers to make deliberately deceptive statements and to play the "audit lottery." Id. at 277.

In these cases petitioners gave sufficient information to calculate the tax due, even without reference to the full explanations that they gave in the letters filed with their returns. Each of the petitioner's returns did inform the Internal Revenue Service of her taxable income and was in processible form. Indeed, each of the returns was in fact processed, the correct tax determined, and the penalty imposed, all

without audit or examination.

Petitioners did not place a burden on the government to pull the returns for manual processing. All tax returns are routinely checked for formal, mathematical, and clerical accuracy. Internal Revenue Service, Statement of Procedural Rules Sec. 601.105(a); 1A C.C.H.Fed.Tax Guide Par. 15,001 (1985). Errors of this type are corrected with notification to the taxpayer of adjustment in the amount of additional tax or refund due. By statute, routine correction of errors in this way is exempt from the formal deficiency notice procedure. 26 U.S.C. Sec. 6213(b), (g)(2). This automatic checking and correction procedure is what brought to light and adjusted the unauthorized claims made by the petitioners in these cases. No audit and examination

were necessary, nor in fact were carried out. The burden on the government was relatively slight, not different or greater than the action required of the government to rectify clerical errors made in the general run of tax returns.

Thus, whether or not the tax returns filed in these cases fell within the literal language of Sec. 6702, they plainly were not within the ambit of the legislative intent to establish a simple and summary penalty for those who undertook to deceive the Internal Revenue Service with erroneous information, or by omissions to prevent the Service from ascertaining the correct tax due.

Because Sec. 6702 imposes a penalty -- a punishment for wrongdoing -- the rule of lenity applies, so that any question as to whether the conduct of the

petitioners is covered by the terms of the statute, must be resolved against the government and in favor of the citizens. Rewis v. United States, 401 U.S. 808, 821 (1971); Baca v. Commissioner, 326 F.2d 189 (5th Cir. 1964)(forfeiture statute).

To construe the statute in such a way as to encompass the tax returns in these cases, would give rise to serious constitutional objections under the First Amendment right to petition, as is amplified in Part II, infra. Because of the serious constitutional objections to application of the statute in the manner contended by the respondent, the law must be construed in petitioners' favor to avoid the possibility of unconstitutionality. "When the validity of an act of the Congress is drawn in question, and

even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932).

II. THE STATUTE 26 U.S.C. SEC. 6702, IMPOSING A CIVIL PENALTY ON FRIVOLOUS TAX RETURNS, VIOLATES THE FIRST AMENDMENT RIGHT TO PETITION, WHEN APPLIED TO A RETURN FILED IN GOOD FAITH, AND WHICH CONTAINS ALL NECESSARY INFORMATION FOR THE TAX DUE TO BE ASSESSED AND COLLECTED, BUT WHICH ALSO CONTAINS A MESSAGE PROTESTING AGAINST MILITARY EXPENDITURES.

1. The right to petition is independent of, and far broader than, the other First Amendment expressive rights, and this court should reconsider and reject the contrary implication in its decision last term of McDonald v. Smith.

In this Court's decision last term

of McDonald v. Smith, ____ U.S. ____ (No. 84-476, June 19, 1985), both the majority and concurring opinions assume, but do not expressly hold, that the First Amendment right to petition extends no further than the cognate expressive rights of free speech and press. Here petitioners urge that whatever their rights may be under the principle of freedom of speech, their communications were independently protected by the First Amendment right to petition.

In McDonald v. Smith, the Court appeared to treat the right to petition as surplusage in the First Amendment. A thorough analysis of the history, textual development and draftsmen's intent of the right to petition and the purposes and interests served by that right reveals that the right to petition must be re-

garded as far more nearly an absolute right than the freedoms of speech and press, and subject to fewer limitations than have grown up around these other expressive rights.

As properly defined, the right to petition clearly protects the communications to the government that are the basis of the instant cases. The petitions in these cases fall squarely within the traditional activity out of which petition evolved as a constitutional right in England. These petitioners were saying, just as their English forebears did, that their grievances about government policies should be addressed before they were required to support the government with their tax money. As early as the reign of Elizabeth I, it was said to the members of Parliament by their con-

stituents that, "redress of grievances must precede supply." Brown, Ideas of Representation from Elizabeth to Charles II, 11 J.Mod.Hist. 23 (1939). Indeed, the historic Petition of Right of 1628 was granted by the king in order to secure supply for the army and navy, which Parliament had withheld until he gave his assent. D. L. Keir, The Constitutional History of Modern Britain Since 1485, 191-192 (6th ed. 1960).

(a) History. Only two historical references are provided in the majority and concurring opinions in McDonald v. Smith. One is the mischaracterization in a footnote in the majority opinion, as an "attack" on the right to petition, of Parliament's enactment in "the 1790's" of a statute making illegal public meetings of more than 50 persons for the purpose

of petitioning without a magistrate present. Slip op.maj., p. 5, n. 5. The statute in question controlled the assembly incidental to petitioning, not the core petitioning activity itself. As Pitt, whose government proposed the law, so eloquently stated: "No one would venture to deny the right of the people to express their opinions on political men and measures and to discuss and assert their right of petitioning all branches of the legislature . . . a most valuable privilege, of which nothing should deprive them." 32 Parl.Hist. 274-75 (Nov. 10, 1795). Moreover, the statute, the Seditious Public Meetings Act of 1795, was enacted four years after 1791, the year in which the common and constitutional law of England became fixed for the purposes of the United

States Bill of Rights. Curtis v. Loether, 415 U.S. 189, 193 (1974). The other historical reference, which appears in both the majority and concurring opinions, is a claim that American libel cases decided prior to the adoption of First Amendment reveal conflicting positions on the privilege afforded to petitioners. Slip op.maj., p. 3, slip op. concur., p. 4. In fact, there appear to have been no cases of this description. It must be assumed, therefore, that the English common law of absolute immunity, as expressed in Lake v. King, 1 Wms. Saund. 131, 85 Eng. Rep. 137 (1680), was the law in America. The first reported American case dealing with this issue is Harris v. Huntington, 2 Tyler 129 (Vt., 1802), which upheld absolute immunity for petitioners from defamation

claims in an opinion that relied upon the English common law and the history of the right to petition.

The right to petition derives from English constitutional sources that long antedate the conception of a general freedom of expression. The earliest petition recorded in our constitutional history is the petition in 1013 of the English leaders to Aethelred the Unready, who had fled to France during an invasion of the Danes, listing their grievances and summoning him to appear in council. He responded by promising not to retaliate against them for setting forth their complaints and for other actions they had taken, and promising that he would remedy their grievances. Marsh, Documents of Liberty 13-14 (1971). Magna Carta of 1215, the funda-

mental source of Anglo-American liberties, was granted in response to a petition, and specifically recognized petitioning as a right. "[I]f we, our justiciar, or our bailiffs or any of our officers, shall in anything be at fault toward anyone, or shall have broken any one of the articles of the peace or of this security, and the offenses be notified to four barons of the five-and-twenty, the said barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have the transgression redressed without delay." McKechnie, Magna Carta 467 (2d ed. 1914) (emphasis added). Under Edward III it became established practice at the opening of every session of parliament for the chancellor to declare the king's

willingness to consider petitions of the people. D.H.Williams, A History of England, 174-078 (1967). James I issued a proclamation in 1622 that it is "the right of his subjects to make their immediate addresses to him by petition." Proclamation 10 July, 19 Jac., 5 Parl. Hist.App.p. ccxiv. Charles I in 1644 invited any subjects with grievances to freely address themselves to him by petition, with the promise that their complaints would be heard. 5 Parl. Hist. App. p. ccxiv.

In 1669, the Commons resolved, "[I]t is an inherent right of every commoner of England to prepare and present Petitions to the House of Commons in case of grievance . . ." 4 Parl. Deb. (1st ser. Cobbett) 432-33 (1669). In response to Shaftesbury's vast campaign to collect

signatures to petitions favoring an assembly of parliament, the king issued a proclamation prohibiting the promotion of petitions for "specious ends." C. S. Emden, The People and the Constitution, 75 (2d ed. 1959). Parliament rejoined in 1680 with a resolution that "it is and ever hath been the undoubted right of the subjects of England to petition the King for the calling and sitting of Parliament and the redressing of grievances" and a further resolution "that to traduce such petitioning is a violation of duty, and to represent it to his majesty as tumultuous and seditious is to betray the liberty of the subject, and contribute to the design of subverting the ancient legal constitution of his kingdom, and introducing arbitrary power." 4 Parl. Hist. 1174; C.S. Emden, supra, p. 30.

Parliament then proceeded against those persons who had advised or promoted the royal proclamation "in abhorrence of petitioning."

Seven bishops drew up and presented an humble petition to James II in 1688, expressing the view that a declaration he had commanded to be read at divine services was illegal. They were prosecuted for seditious libel. The petition was held seditious as a matter of law, but the jury nullified the law and acquitted the bishops. 3 Celebrated Trials and Remarkable Cases of Criminal Jurisprudence, 144, 157, 161, 164; 12 Howell's State Trials 183 (1688). The Case of the Seven Bishops led directly to the Glorious Revolution of 1688 and to the adoption of the Bill of Rights, where the right to petition was codified a century

before the American Revolution: "[I]t is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning is illegal." M.A. Thomson, Constitutional History of England 1642-1801, 171-74 (1938). The statute's recitation of purpose makes it clear that the law declared in the Case of the Seven Bishops was rejected, stating that James II had endeavored to "subvert and extirpate" the "Laws and Liberties of the Kingdom" by "committing and prosecuting diverse worthy prelates for humbly petitioning to be excused from concurring to the said assumed Power." 1 Will. and Mar. Stat. 2, c. 2.

Members of the grand jury of Kent were held in contempt of Parliament in 1701 for a "scandalous" and "seditious" petition in which they had asked that the

king be granted money needed for prosecution of war with France. There was an upwelling of public sentiment, sparked by pamphlets authored by Daniel Defoe and others, which forced parliament to grant the requested money bills and speedily adjourn, the adjournment working the release of the petitioners before the legality of their confinement could be tested by habeas corpus. Defoe, "History of the Kentish Petition," and "Legion's Memorial" in An English Garner: Later Stuart Tracts, 159, 179 (G.A. Aitken ed. 1903). Also reprinted in 5 Parl. Hist. App. No. XVI and pp. 1252-55. Somers, Jura Populi Anglicani or the Subjects' Right of Petitioning Set Forth (1701), reprinted in 5 Parl. Hist. App. No. XVIII. See also 5 Parl. Hist. 1251, 1256-57. It is widely held that after

the events of 1701 and their sequel in 1702, the right to petition in England had become absolute, and that from then to the time of the adoption of the United States Bill of Rights, no English subject was ever prosecuted, punished or proceeded against in any manner for the act of petitioning or the content of a petition. C. S. Emden, The People and the Constitution., 77 (2d ed. 1959); Smith, "Shall Make No Law Abridging . . . : An Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U.Cincinnati L.Rev. ____ (in press). See 5 Parl. Hist. 1337-40. Another view is to the effect that petitioning did not become an absolute right in England until the Middlesex election controversy of 1769. Fraser, Public Petitioning and Parliament Before 1832, 46 History 195,

201 (1961). Even so, it is not disputed that petitioning in England had become an unqualified freedom well before 1791.

Likewise, in the American colonies petitioning had become essentially an absolute right by the Eighteenth Century. For example, a painstaking study of petitioning in Colonial Virginia of this period discloses that petitioners were not subject to punishment for their activities, and the efforts of three royal governors - Beckley, Effingham and Spotswood - to interfere with petitioning were successfully thwarted by the colonists. R. C. Bailey, Popular Influence Upon Public Policy: Petitioning in Eighteenth Century Virginia, 30, 38-39 (1979).

In sharp contrast to the right to petition, the freedoms of speech and of the press were curtailed through a varie-

ty of devices in both England and America before the Revolution. See generally, F. Siebert, Freedom of the Press in England 1476-1776, (1952), and L. Levy, Freedom of Speech and Press in Early American History: Legacy of Suppression (1963). Political expression unpopular with the government was prosecuted as seditious libel. If juries failed to convict, the House of Commons and colonial assemblies cited and imprisoned authors and public speakers. F. Siebert, supra, at 371-72; L. Levy, supra, at 15-16, 20-23. Various acts regulating printing and imposing taxes severely restricted the press. F. Siebert, supra.

(b) Textual Development. In McDonald v. Smith, no consideration is given to the development of the text of

the First Amendment petition clause. Its language appears to be drawn from the petition clauses in Magna Carta and the British Bill of Rights, which supports the interpretation that the English late Eighteenth Century absolutist conception of the right to petition was intended to be adopted by the framers of the First Amendment.

There are also American charter, declaration, and state constitutional sources which appear to be related to the language of the petition clause. The earliest of these sources is the Body of Liberties adopted by Massachusetts Bay Colony in 1642, which provided:

> [E]very man whether Inhabitant or Foreigner, free or not free, shall have liberty to come to any publick Court, Council or Town Meeting, and either by speech or writing, to move any lawful, seasonable or material Question, or to present any necessary Motion, Complaint, Petition,

> Bill or Information whereof that Meeting hath proper cognizance, for it be done in convenient time, due Order and respective Manner. -- Colonial Laws of Massachusetts, Reprinted from the Edition of 1672, 90 (1887).

Declarations of rights by state conventions during the revolutionary era including Pennsylvania (1776),[1] Delaware (1776),[2] North Carolina (1776),[3] Vermont (1777),[4] Massachusetts (1780),[5] and New

---

[1] 5 Thorpe, The Federal and State Constitutions, Colonial Chaters and Their Organic Laws, 3081-92 (1909).

[2] 1 Laws of the State of Delaware 1700-1797, app. 79-81 (1797).

[3] 2 Poore, Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States 1409-11.

[4] 6 Thorpe, supra, at 3737-41.

[5] Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay 1779-1780, 191-197.

Hampshire (1783), [6] expressly set out the right to petition. Instead of the numerous limitations (lawfulness, seasonableness, materiality, necessity, within the body's cognizance, convenient time, due order, "respective" manner) placed on petitioning by the Massachusetts Body of Liberties of the last century, these declarations qualified the right to petition only by specifying that it must be exercised in an "orderly and peaceable manner'" except for North Carolina, Pennsylvania, and Vermont, which placed no limitations whatever on the right. Four of the American republics, Maryland,[7] New York,[8] North Carolina,[9] and

---

[6] 4 Thorpe, supra, at 2453-57.

[7] 2 The Debates in the Several State Conventions on the Adoption of the Constitution 547-56.

Virginia,[10] specified in their ratifying conventions for the proposed federal constitution that the right of petition should be guaranteed; of these, only Maryland included the requirement of "peaceable and orderly manner" or any other limitation. To the extent the First Amendment right of petition was drawn from these state sources, and in light of the elimination in these sources of limitations on the right to petition, except for peaceableness and orderliness, it would be reasonable to assume that the framers did not intend to allow peti-

---

[8] 2 Documentary History of the Constitution of the United States 190-203.

[9] 4 The Debates in the Several State Conventions on the Adoption of the Constitution 55-251.

[10] 3 The Debates in the Several State Conventions on the Adoption of the Constitution 21-663.

tioners to suffer ill consequences for the contents of their communications.

(c) Draftsmen's Intent. The provision of the First Amendment guaranteeing the right to petition was drafted by Madison and extensively debated in the House of Representatives and then amended in the Senate. The original proposed text of the First Amendment was: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed." 1 Annals of Congress, 685-92; 2 B. Schwartz, The Bill of Rights: A Documentary History, 1089-91 (1971). Congressman Sedgwick moved to strike out "assemble and" because that was encompassed within the concept of

free speech in his view. Opponents of the motion stated that all the enumerated rights were separate rights inherent in the people, and should be specifically protected against infringement by the government. The motion to strike was defeated. 2 B. Schwartz, supra, at 1091-1105. The defeat of this motion, perhaps to have been followed if successful by a motion to strike petitioning, should be regarded as evidence of Congressional intent that petitioning was deemed to be a unique right, a right entirely distinct from speech and press. The Senate rewrote the petition language to essentially its present form; after insignificant amendments in both House and Senate, it emerged in its final language. History of Congress Exhibiting a Classification of the Proceedings

of the Senate and the House of Representatives from March 4, 1789, to March 3, 1793, 155-59, 160-68, 169-70, 171-73. Thus, the only amendment of the text of the First Amendment that significantly affects the petition clause was to substitute the word "petition" for the words "apply to." Although no statement of intent accompanied this change of language, it could have had the purpose, and should be held to have the effect, of encrusting the substituted term with its well established common law and historical meaning as an absolute right. Bradley v. United States, 410 U.S. 605 (1973).

The only mention the majority and concurring Justices in McDonald v. Smith make of the intent of the draftsmen of the First Amendment is a reference in

both opinions to Madison's speech in the First Congress, "[T]he people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will." 1 Annals of Congress 738 (Aug. 15, 1789). The authors of the opinions cited this statement as an indication that Madison believed petitioning was encompassed within speech. Slip op. maj., p. 3; slip op. concur., p. 5. When Madison's remark is placed in context, however, it is plain that this was not his intended meaning. Madison's statement was made in the course of a debate on whether representatives should have to submit to the instructions of the electorate. Although he concurred with the majority and voted

to reject the proposed right of instruction, Madison and everyone else agreed that popular opinion ought to be received and considered, and the right to petition for redress of grievances must be respected. 2 B. Schwartz, supra, at 1093-94. The reliance placed in the debate on the alternative of petitioning as a means of making known the public will, must be accepted as indicating that the right of petition was regarded as a unique right.

(d) Purposes and interests served. The only reference in McDonald v. Smith to the interests served by petitioning is a generalized comment in the concurring opinion that the "self-governance" function is as fully served by speech and the press as it is by petition. Slip. op. concur., p. 4. It is doubtless true that

any function of petitioning could be served by exercise of the speech and press rights, if the latter were not subject to limitation. Injury is done to the vital interests served by petitioning, however, when limitations on expressive rights generally are automatically engrafted on the right to petition. For the public good, there should be as little restriction as possible on petitioning so that the following vital interests can be fulfilled:

(i) Petitioning is the means by which peoples' problems that need government actions are brought to the attention of the government. Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127, 137-38 (1961).

(ii) Petitioning is a principal source of the government's information

upon popular attitudes about the way it has conducted public business. See, Osborn v. Pennsylvania Delaware Service State Dealers Assoc., 499 F.Supp. 553 (D.Del. 1980).

(iii) Incompetence, corruption, waste and other government misconduct are often disclosed by petitions and consequently remedied. See Ambrosius v. O'Farrell, 119 Ill.App. 265 (1905).

(iv) In a popular sovereignty petitions are a principal measure of the degree of public approval enjoyed by the incumbent government and its prospects for being kept in office.

(v) The right of petitioning is commonly understood to be of such great value that in English constitutional history, disregard of this right provoked popular uprisings, e.g., The Case of the

Seven Bishops and the Kentish petitioners. Efforts to place "time, place and manner" restraints upon these petitioners were unsuccessful. The statute 13 Car. II, Stat. I, c. 5, placing signatory and presentational numerical limits on petitioning was never successfully enforced. See 5 Parl. Hist. 400 (Aug. 14, 1689).

(vi) A number of fundamental constitutional reforms were preceded by extensive petitioning activity. The most important of these was the development of popular sovereignty, first by establishing the legislative supremacy of parliament in the course of the English Civil War and ensuing events, 1 J. W. Allen, English Political Thought 1603-1660, 346-347 (1939); C. S. Emden, The People and the Constitution, 74 (2d ed. 1959); Coates, Some Observations on the Grand

Remonstrance, 4 J. Mod. Hist. 1, 2-5 (1932), and second by gaining universal manhood suffrage though electoral reform. J. Harvey and L. Bather, The British Constitution 54 (2d ed. 1969); C. S. Emden, supra, at 77-78. Also the abolition of slavery, both in the British Empire, C. S. Emden, supra, at 77-79, and the United States, H.Von Holst, The Constitutional and Political History of the United States, 284 (1888); D. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations, 81-96 (1971) (University Microfilms, unpublished thesis), was the subject of massive petition campaigns.

(vii) The availability of petitioning as a popular right allows public feelings to be expressed in a peaceful,

orderly way and may be a foil to revolution. Certainly this is indicated by a comparison of the events in England and on the Continent in the revolutionary years of 1831 and 1846. J. Harvey and L. Bather, supra, at 54; C. S. Emden, supra, at 77-78.

It is essential that the Court reexamine the right to petition in light of its history, textual development, draftsmen's intent and interests and purposes served. The court must reject the assumption made in McDonald v. Smith that restrictions applicable to speech and the press automatically apply to petitioning, and must recognize that the right to petition is a nearly absolute right.

2. Even if the right to petition can be overcome by proof of bad faith,

petitioners' conduct is protected since the trial court found as fact that they acted in good faith.

In the case of Smith v. Arkansas Highway Employees' Local 1315, 441 U.S. 463, 465 (1979), the Court explicitly stated that one who petitions the government is "protected by the First Amendment from retaliation for doing so. . . ."

The only limitations that the Supreme Court has recognized with respect to the right to petition, apply in situations where private interests are invaded by the petitioning activity. In Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127, 144 (1961), it was held that the right to petition the government is protected by the First Amendment unless it is a mere sham to cover activities prohibited by the anti-

trust laws, even if the petitioner's sole purpose is to destroy its competition. In McDonald v. Smith, ____ U.S. ____ (No. 84-476, June 19, 1985) this Court held that the right to petition protects the petitioner against a private lawsuit for libel unless he acted maliciously.

Plainly no private interests are affected in this case; the petitioners' grievance is solely with the government. In the absence of injury to private interests, there is no basis for either the sham or malice exceptions, and the right to petition should remain unqualified. But even if these limitations were applicable, petitioners' conduct in these cases is protected, since the district court noted that neither it nor the government "challenges the sincerity of

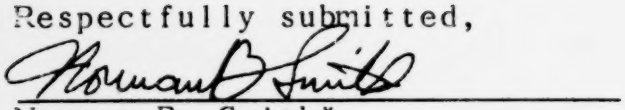
[the] religious or moral beliefs . . ." of petitioner Gibbs, and that petitioner McKee "likely acted with good intentions" and as the government concedes "has not attempted to avoid any of her tax responsibility." (pp. 29a, 37a, 46a, infra).

This Court must not allow petitioners' rights to register their complaints with the government, to be outweighed by minor inconvenience to government clerks.

CONCLUSION

For all of the foregoing reasons, petitioners pray that this Court issue writ of certiorari to review the judgment and opinion of the court of appeals.

Respectfully submitted,



Norman B. Smith*
Smith, Patterson, Follin,
Curtis, James and Harkavy
700 Southeastern Building
Greensboro, NC 27401
Telephone: (919) 274-2992

Counsel of Record

* The prosecution of this proceeding is sponsored by the North Carolina Civil Liberties Union Legal Foundation, Inc.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 85-1015(L)

Elizabeth S. McKee,
Appellant,

versus

United States of America,
Appellee.

NO. 85-1214

Deborah Gibbs,
Appellant,

versus

United States of America,
Appellee.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro and Durham. Hiram H. Ward, District Judge. (CA 84-677 and C/A 84-849)

Argued: June 5, 1985
Decided: January 21, 1986

Before PHILLIPS and MURNAGHAN, Circuit

Judges, and HOFFMAN, Senior United States District Judge of the Eastern District of Virginia, sitting by designation.

Norman B. Smith for Appellant; Glenn L. Archer, Jr., Assistant Attorney General; Michael L. Paul, Gary R. Allen, and Lisa A. Prager, Attorneys, Tax Division, Department of Justice; Kenneth W. McAllister, United States Attorney, for Appellee.

HOFFMAN, Senior District Judge:

These cases are consolidated on appeal from orders of the United States District Court for the Middle District of North Carolina, granting summary judgment to the government on plaintiffs' tax refund suits. The appeal questions the applicability of 26 U.S.C. Sec. 6702 to the factual situations presented and further questions the constitutionality of the statute itself. We affirm the judgments of the district court, holding that 26 U.S.C. Sec. 6702 is a constitu-

tional statute which is applicable to the 1983 tax returns filed by appellants McKee and Gibbs.

FACTS

Plaintiff taxpayers, Elizabeth McKee and Deborah Gibbs, both filed 1983 federal income tax returns (Form 1040) on which they claimed credits based on their estimates of the share of their taxes allocated to defense spending. McKee altered line 42, labeled "foreign tax credit," so that it became "foreign war tax credit." McKee then claimed a credit of $561.66 on line 42 and again on line 48 (total credits). Based on the "foreign war tax credit," McKee computed her total tax as $956.34 (line 56). She reported an overpayment of $2,009.03 (line 65). Instead of requesting a refund of the full amount of overpayment,

McKee requested $1,447.37, the amount that would have been shown as an overpayment had McKee not claimed the "foreign war tax credit." On line 67, McKee altered the words "Amount of Line 65 to be applied to your 1984 estimated tax" so that the line subsequently read, "Amount of line 65 to be spent on social service." On line 65, McKee then entered $561.66, the amount of credit claimed on lines 42 and 48. Further, McKee attached to her return a letter, in which she explained her objection to defense spending and her request that the $561.66 allocated thereto be used instead for social services.

Deborah Gibbs entered "CMTC ESCROW ACCT" at line 48 of her 1983 federal income tax return and took a credit of $248.80 on that line. This entry reduced

the total tax shown on line 56 and increased both the overpayment shown on line 65 and the refund requested on line 66. Gibbs attached an explanatory letter to her return. In the letter, she noted that she believed that 40% of her tax liability would be allocated to military expenditures. Gibbs requested a refund of 40% of her tax liability, which she alleged she would deposit into the "Conscience and Military Tax Campaign Escrow Account for a World Peace Tax Fund."

The Internal Revenue Service (IRS) assessed a $500.00 penalty against both McKee and Gibbs, pursuant to 26 U.S.C. Sec. 6702. Each taxpayer paid 15% of the penalty ($75.00) and filed a claim for a refund with the IRS pursuant to 26 U.S.C. Sec. 6703(c). The refund claims contended that the penalties were impro-

perly assessed and that Sec. 6702 was unconstitutional. The IRS denied the refund claims, whereupon McKee and Gibbs brought separate suits in the district court for recovery of their payments.

The district court granted the government's motion for summary judgment, accepting the argument that taxpayers' self-assessments were substantially incorrect because both McKee and Gibbs had claimed an unallowable war tax credit. The court also held that the returns were bound by Sec. 6702, a statute which does not violate a taxpayer's constitutional rights. The taxpayers appeal the granting of the summary judgments. We affirm the judgments of the district court.

STANDARD OF REVIEW

The facts of this case are uncon-

tested. We review de novo the district court's grant of summary judgments to determine whether taxpayers are entitled to prevail as a matter of law. Jenney v. United States of America, 755 F.2d 1384, 1386 (9th Cir. 1985); Heiniger v. City of Phoenix, 625 F.2d 842, 843 (9th Cir. 1980).

DISCUSSION

Applicability of 26 U.S.C. Sec. 6702

The legislative history of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) reflects Congressional intent regarding the scope of Sec. 6702:

> [T]he penalty could be imposed against any individual filing a "return" showing an incorrect tax due, or a reduced tax due, because of the individual's claim of a clearly unallowable deduction, such as . . . a "war tax" deduction under which the taxpayer reduces his taxable income or shows a reduced tax by that individual's estimate of the amount of his taxes going to the Defense Department budget, etc.

S. Rep. No. 494, 97th Cong., 2d Sess. 278, reprinted in 1982 U.S.Code Cong. & News 781, 1024. This excerpt form the legislative history of Sec. 6702 clearly indicates that a penalty is applicable to a taxpayer who claims a "war tax" deduction.

The statute 26 U.S.C. Sec. 6702 provides:

Frivolous income tax return.

(a) Civil penalty. - If -

(1) Any individual files what purports to be a return of the tax imposed by subtitle A but which -

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) The conduct referred to in paragraph (1) is due to -

(A) a position which is frivolous,

or

(B) a desire (which appears on the purported return) to delay or impede the administration of federal income tax law,

then such individual shall pay a penalty of $500.

(b) Penalty in addition to other penalties. - The penalty imposed by subsection (a) shall be in addition to any other penalty provided by law.

This section of the Internal Revenue Code (IRC) was enacted as a part of TEFRA specifically to improve compliance with federal laws. See S. Rep. No. 494, 97th Cong., 2d Sess. 278, reprinted in 1982 U. S. Code Cong. & Ad. News 781, 1023. The provision was enacted in response to the recent activities of various tax protest movements across the country. Congress provided for the immediate assessment of a civil penalty of $500 to deter the specific threat to the integrity of the self-assessment system

posed by such tax protestors.

McKee and Gibbs each reduced the amount of total tax liability reported on her 1983 return by claiming a war tax credit. Section 6702 clearly applies to such actions, as explained in the excerpt from the legislative history, supra. Taxpayers are required to self-assess according to 26 U.S.C. Sec. 6011. Commissioner v. Lane-Wells Co., 321 U.S. 219, 223 (1944). By claiming patently improper war tax credits and thereby reducing the tax liabilities that they were required to self-assess, both McKee and Gibbs filed returns containing "information that on its face indicates that the self-assessment is substantially incorrect." 26 U.S.C. Sec. 6702(a)(1)(B).

The appellants argue that their

returns and self-assessments were not substantially incorrect. In support of their position, the taxpayers note their intentions to pay the correct tax owed and assert that the deviations which they describe as "minor" were not "patently improper." Although the taxpayers completed their Forms 1040 in slightly different ways, those differences are insignificant in the application of 26 U.S.C. Sec. 6702 to both cases. Contrary to the taxpayers' contentions, whether their conduct resulted in an actual loss of revenue to the government is irrelevant. Both McKee and Gibbs submitted substantially incorrect returns in 1983.

Taxpayers' contentions that their returns were not filed in a "patently improper" manner are erroneous. As previously noted, the legislative history

of Sec. 6702 is poignantly clear that a reduction in the amount of reported tax liability based upon opposition to defense spending is a specific type of protest filing that Congress intended to counteract with this statute. See S. Rep. No. 494, supra at 278. Because the correct liability is not reported on returns such as those submitted by McKee and Gibbs, the Commissioner cannot process the returns by normal administrative procedures. Returns such as those involved here are identified as calling for adjustment and are pulled for manual processing. Thus, as the district court correctly noted in regard to McKee, one single line on the Form 1040 is not the line of self-assessment; filling out the entire form correctly is the exercise of self-assessment. McKee and Gibbs have

failed in their duty to comply with regulations. See Lane-Wells Co., 321 U.S. at 223.

The taxpayers are in no way exonerated by the explanatory letters which they attached to their tax returns and in which they explained the bases of their computations. In Jenney, 755 F.2d at 1386, the Ninth Circuit rejected the use of explanatory attachments to modify a tax return that was substantially incorrect. Citing Lane-Wells Co., 321 U.S. at 223, the court in Jenney correctly points out that the purpose of our tax system of self assessment is not only to get tax information but also to receive that information arranged uniformly and completely so that the handling and verifying of returns are facilitated. In Jenney, the taxpayers claimed a "con-

science deduction" and computed their tax liability accordingly on their tax returns. The court held that the attached letter of explanation did not alter the fact that the self-assessment on the return itself was substantially incorrect and that the penalty imposed under 26 U.S.C. Sec. 6702 was correctly applied. Id. at 1387. Accord, Welch v. United States, 750 F.2d 1101 (1st Cir. 1985); Kahn v. United States, 753 F.2d 1208 (3d Cir. 1985).

Jenney, Welch, and Kahn also address the Sec. 6702 requirement that the taxpayer's position is frivolous. McKee and Gibbs contend that because their actions were not outrageous but were instead motivated by sincere conscientious beliefs, the court should not find their actions frivolous. We agree with the

reasoning in Kahn, 753 F.2d at 1214, that the test for frivolousness is an objective one, under which we must evaluate a taxpayer's position in terms of its legal underpinnings. Neither the holding of sincere religious beliefs nor the expression of anti-war sentiments is a frivolous action. However, to take a position which indicates a desire to impede the administration of tax laws is a legally frivolous action. It is the latter which McKee and Gibbs have done. Therefore, the penalty provision of 26 U.S.C. Sec. 6702 is directly applicable to them.

Constitutionality of 26 U.S.C. Sec. 6702.

McKee and Gibbs contend that 26 U.S.C. Sec. 6702 violates their First Amendment rights to free speech, to free exercise of religion, to petition for redress of grievances; additionally they

allege the statute is vague. Without justification, the taxpayers rely on a familiar line of Supreme Court cases which set forth tests for determining First Amendment freedoms: Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). As the government brief correctly asserts, First Amendment challenges to Section 6702 have been consistently rejected by the courts. See, e.g., Carey v. United States, 765 F.2d 138 (4th Cir. 1985); Welch v. United States, 750 F.2d 1101 (1st Cir. 1985); Kahn v. United States, 753 F.2d 1208 (3d Cir. 1985); Jenney v. United States, 755 F.3d 1384 (9th Cir. 1985); Franklet v. United States, 578 F.Supp. 1552, 1556-57 (N.D. Cal.

1984); Drefchenski v. Regan, 589 F.Supp. 1516, 1524-27 (W.D.La. 1984); Harper v. United States, 587 F.Supp. 1056, 1058 (E.D.Pa. 1984); Scull v. United States, 585 F.Supp. 956, 061 (E.D.Va. 1984); Bearden v. Commissioner, 575 F.Supp. 1459 (D.Utah 1983). Concurring with these precedents and upholding the judgments of the district court we reject each of the McKee's and Gibbs' constitutional arguments.

For the reasons given in the foregoing paragraphs, the judgments of the district court are AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ELIZABETH S. MCKEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C-84-677-G
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

This is an action to recover a $500 penalty assessed against plaintiff by the Internal Revenue Service (I.R.S.) for a frivolous tax return pursuant to 26 U.S.C. Sec. 6702. It comes before the Court on defendant's Motion to Dismiss or For Summary Judgment (September 24, 1984). Because plaintiff's conduct falls within the scope of section 6702, the Court will grant defendant's motion.

The relevant facts are not in dispute. Plaintiff filed her 1983 Form 1040

Individual Income Tax Return on February 21, 1984. Declaration of Betsy E. Burke, Exhibit A (September 24, 1984)(hereafter Form 1040, line _____). Plaintiff computed her tax based on taxable income to be $1,518. Form 1040, line 40. She then indicated a $561.55 foreign war tax credit, Form 1040, lines 42 & 48, and balanced her total tax at $956.34. Form 1040, lines 49 & 56. (Line 42 of the tax return provides a space for a "foreign tax credit," but plaintiff wrote in the word "war" so that line 42 read "foreign war tax credit.") Plaintiff subtracted the total tax from her tax payments (withholdings) and showed a tax overpayment of $2,009.03. Form 1040, line 65. She directed that $561.66 of that overpayment be spent on social services, Form 1040, line 67, thus reducing her refund

to $1,447.37. Form 1040, line 66. (Line 67 of the tax return provides a space for "[a]mount of line 65 to be applied to your 1984 estimated tax," but plaintiff crossed out "to be applied to your 1984 estimated tax" and wrote in "to be spent on social services.") The $1,447.37 refund plaintiff indicated was due was the same as would have been due had the return been submitted in proper form rather than with its irregular entries.

Plaintiff attached a letter to her tax return explaining the purpose of the irregular entries. Burke Declaration, Exhibit A at 5. The letter stated that plaintiff claimed a thirty-seven percent tax credit, an amount she believed approximated the military portion of the federal budget, because she was opposed to the manufacture and use of weapons and

did not want her taxes spent on military weapons, forces, or research. Plaintiff expressed a concern that military spending diminished spending towards feeding, clothing, housing, and educating the poor. She requested that the thirty-seven percent of her taxes be spent for peace and social services. Plaintiff expected a refund no larger than she entered on line 66 of the return.

On April 2, 1984, the I.R.S. assessed a $500 penalty against plaintiff under 26 U.S.C. Sec. 6702. Plaintiff paid $75, fifteen percent, of the penalty. On April 18, 1984, plaintiff filed a claim for refund of the $75 with the I.R.S. The I.R.S. deducted the remaining $425 from plaintiff's tax refund. Plaintiff's Amended Complaint (August 21, 1984) seeks repayment of the $500 penalty

plus interest and attorney's fees on the grounds that the assessment was unlawful, unconstitutional, and unreasonable.

The federal income tax system in this country is premised on reporting of income and determination of tax liability by individuals subject to income tax imposition. See 26 U.S.C. Sec. 1. Persons liable for income taxation are required to file a return or statement according to the forms and regulations prescribed by the I.R.S. 26 U.S.C. Sec. 6011. Information required on the tax return includes not only income less adjustments and deductions, but the taxpayer must also compute the tax liability, determine total tax owed for the reporting year, and calculate the appli-

cable refund or additional money owed.[1] As a general rule, this information must be filed on forms prescribed by the I.R.S.[2] Returns filed without sufficient information or which contain incorrect information do not fully meet the filing requirements imposed by law on taxpayers. Moreover, such returns, even ones

---

[1] Certain individuals may elect not to show the amount of tax due for that year on their return and the I.R.S. will compute the tax. This option is restricted by specific income and deduction limitations. 26 U.S.C. Sec. 6014; 26 C.F.R. Sec. 1.6014.2. In 1983, plaintiff was not eligible for this election.

[2] In the absence of a prescribed form, a statement of gross income and deductions may be tentatively filed subject to supplementation by a return made on a proper form without unnecessary delay. 26 C.F.R. Sec. 1.6011-1(b). A person may also file a composite return in lieu of a specified form but only with authority of the Commissioner of I.R.S. in accordance with such special rules, conditions, and limitations directed. 26 C.F.R. Sec. 1.6012-5.

that have a small number of deviations, are counterproductive to the income tax reporting system.

In 1982, Congress found that the filing of incomplete or incorrect tax returns presented a problem which necessitated legislative action. As part of the Tax Equity and Fiscal Responsibility Act of 1982, it enacted 26 U.S.C. Sec. 6792, entitled "Frivolous income tax return," which provides as follows:

(a) Civil penalty. --If--

(1) Any individual files what purports to be a return of the tax imposed by subtitle A but which --

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) The conduct referred to in para-

graph (1) is due to -

> (A) a position which is frivolous, or
>
> (B) a desire (which appears on the purported return) to delay or impede the administration of federal income tax law,
>
> then such individual shall pay a penalty of $500.

(b) Penalty in addition to other penalties. - The penalty imposed by subsection (a) shall be in addition to any other penalty provided by law.

The legislative history of the statute indicates that Congress' purpose in authorizing an immediately assessable penalty was to deter the filing of protest tax returns and to demonstrate its determination to maintain the integrity of the income tax system. S. Rep. No. 494, 97th Cong. 2d Sess. 277-78, reprinted in 1982 U.S. Code Cong. & Ad. News 781, 1023-24.

Since plaintiff's tax return con-

tains information on which its substantial correctness may be judged, 26 U.S.C. Sec. 6702(a)(1)(A), the first prong of the statute is met only if the return "contains information that on its face indicates that the self-assessment is substantially incorrect." 26 U.S.C. Sec. 6702(a)(1)(B). Essentially, plaintiff makes two arguments that her conduct is not subject to section 6702(a)(1)(B). Neither are persuasive. First, she asserts that her return is not encompassed by the statute and contends that the policy of the statute, as reflected in the legislative history, support this assertion. The Senate Report gives examples of four situations when imposition of a section 6702 penalty would be appropriate; plaintiff mentions three of the four: (1) returns with altered or

incorrect descriptions of line items that are not designed to report taxable income and are not in processible form, (2) incomplete returns because of spurious constitutional objections, and (3) returns containing insufficient information to calculate the tax. In plaintiff's estimation, section 6702 does not apply unless a return in its entirety is not in a processible form or is incapable of showing the correct self-assessment of the taxpayer's status. This statement of purpose is too narrow for it is drawn from only part of the legislative history. The fourth example in the same Senate Report significantly illustrates that returns like plaintiff's are among those which Congress envisioned that section 6702 would penalize.

> Moreover, the penalty could be imposed against any individual

> filing a "return" showing an incorrect tax due, or a reduced tax due, because of the individual's claim of a clearly unallowable deduction, such as a "gold standard deduction" (i.e., a discount of dollars because the U.S. is not on the gold standard) or a "war tax" deduction under which the taxpayer reduces his taxable income or shows a reduced tax due by that individual's estimate of the amount of his taxes going to the Defense Department budget, etc.

1982 U.S. Code Cong. & Ad. News at 1024 (emphasis added). The tax for a return burdened with such an unallowable deduction could, given attention and efforts beyond that ordinarily due property completed returns, be determined by the I.R.S. Thus, it is clear that section 6702 is not limited to returns that are not in processible form but also includes returns from which taxpayer status can be ascertained by the I.R.S. in spite of the erroneous entries on the face of the return.

Plaintiff's second line of arguments centers on her open recognition of tax liability through entry of the correct refund due on line 66 of the return and in her letter attached to the return. The government would concede that plaintiff has not attempted to avoid any of her tax responsibility. However, section 6702 is intended to penalize only improperly completed returns; it leaves penalty or punishment for failure to pay tax to other laws. See 26 U.S.C. Secs. 6651 and 6653 (penalties for failure to pay tax).

The attached letter is not part of the return and is not relevant for purposes of section 6702. Plaintiff cites Jenny v. United States, 581 F.Supp. 1309 (C.D.Calif. 1984), which held that a letter attached to a tax return should be

construed as a whole for purposes of section 6702. The Court disagrees with the holding in that case. Section 6702 speaks to the correctness for a return. While one may send a letter making declarations like plaintiff made along with their tax returns, a letter gratuitously sent with a return, as opposed to being attached pursuant to specific instructions on the prescribed form or under other direction of the I.R.S., is not a part of, or a supplement to, the return. See, Drefchinski v. Regan, Civ. No. 83-2277, slip op. at 9-10 (W.D.La. June 25, 1984)(attached letter does not change fact of incorrect tax liability on the return);[3] see supra note 2 and accompany-

---

3 A copy of the ruling in Drefchinski is attached to the Memorandum For Defendant in Support of its Motion to Dismiss or For Summary Judgment (September 24, 1984).

ing text. The "self-assessment" which may not be indicated substantially incorrect is that made in the return, not in some editorial or explanatory attachment filed with the prescribed form return.

Entering the correct amount of the refund on line 66 of the return also fails to remove plaintiff's return from the scope of section 6702. The term "self-assessment" refers to a "taxpayer's representations to the government . . . regarding taxes due." Franklet v. United States, 578 F.Supp. 1552, 1557 (N.D.Col. 1984); see 1982 U.S. Code Cong. & Ad. News at 1024 (section 6702(a)(1)(B) is directed at a return which indicates a substantially incorrect tax).[4] A tax

---

[4] The Corut recognizes that completion of a return is practically an exercise in self-assessment from start to

return first ascertains and reports tax liability. Based on that determination the return facilitates computation of what monetary steps, if any, need to be taken by the taxpayer or the government to meet the annual obligation. A refund of overpayment is dependent on the tax obligation and cannot be determined until the tax determination is made. Plaintiff's assessment of her 1983 tax is substantially incorrect because of a clearly unallowable tax credit. For purposes of section 6702, which protects the integrity of properly completed tax returns, this erroneous assessment is not

---

finish and that the final assessment to be made is that of the refund due or additional amount of tax owed. However, line 66 in the case of a refund or line 68 in the case of amount owed do not stand alone but are inextricably interrelated with the other representations, particularly ascertainment of the annual tax obligation.

cured by entry of the "correct" refund due, an amount substantiated on the face of the return only after another improper alteration of the tax form.[5] The adage "two wrongs do not make a right" is appropriate. The Court finds that plaintiff's return contains information on line 42 which indicates that the self-assessments on lines 49 and 56 are substantially incorrect.

With respect to the second statutory criterion, plaintiff's conduct easily satisfies section 6202(a)(2)(A). As used in this statute, "frivolous" is a common-

---

[5] The logical extension of plaintiff's argument would permit a return with no entries or abundant with frivolous entries so long as the correct refund was stated. While plaintiff's conduct sharply contrasts with such returns, it too is in defiance of the tax system in a manner Congress chose to regulate in section 6702(a)(1)(B).

ly understood term. It may be defined as having no basis in law or fact. Webster's Third New International Dictionary 913 (unabridged ed. 1971); see Scull v. United States, 585 F.Supp. 956, 961 (E.D.Va. 1984). A tax credit, like a deduction, is solely a matter of legislative grace and may not be taken without specific Congressional authority. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 54 S.Ct. 788, 78 L.Ed. 1348 (1934); Randall v. Commissioner, 733 F.2d 1565 (11th Cir. 1984). Notwithstanding the sincerity of religious or moral beliefs, a taxpayer may not reduce his or her taxes by an amount believed to be used by the government for military purposes. Lull v. Commissioner, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); see United States

v. Lee, 455 U.S. 252, 260, 102 S.Ct. 1051, _____, 71 L.Ed.2d 127, 134 (1982) (tax system could not function if persons could on religious grounds challenge tax payments which supported war-related activities). A foreign war tax credit is clearly an unallowable adjustment to tax liability and, therefore, is frivolous under section 6702(a)(2)(A).

Finally, plaintiff challenges the constitutionality of section 6702 on the grounds of free exercise of religion, right to petition the government for redress of grievances, freedom of speech, and vagueness. Similar challenges have been made against section 6702 in other reported cases and in every case, as to every ground, the statute has withstood the challenge. Bearden v. Commissioner, 575 F.Supp. 1459 (D.Utah 1983)(right to

petition government); Milazzo v. United States, 578 F.Supp. 248 (S.D.Calif. 1984) (right to petition government); Kloes v. United States, 578 F.Supp. 270 (W.D. Wisc. 1984)(vagueness); Franklet v. United States, 578 F.Supp. 1552 (vagueness, freedom of expression, free exercise of religion, right to petition government); Stamp v. Commissioner, 579 F.Supp. 168 (N.D.Ill. 1984)(right to petition government); Brennan v. Commissioner, 581 F.Supp. 28 (E.D.Mich. 1984) (right to petition government); Ueckert v. United States, 581 F.Supp. 1262 (D.N.D. 1984)(free speech); Auen v. United States, 582 F.Supp. 1132 (D. Ariz. 1984)(vaguenss); Rowe v. United States, 583 F.Supp. 1516 (D.Del. 1984) (vagueness); Scull v. United States, 585 F.Supp. 956 (vagueness, right to petition

government). Concurring with these precedents, the Court rejects plaintiff's constitutional arguments.

CONCLUSION

The penalty imposed on plaintiff, who likely acted with good intentions, may to her seem disproportionate to the foul. However, the federal taxation system depends on correct self-assessments by all taxpayers. Tax returns are not vehicles for expressing personal, religious or other beliefs. The Internal Revenue Service is not the appropriate forum for expressing concern over government spending policies. Congress has found that unauthorized and unfounded tax protestations on returns significantly impugn the efficiency and integrity of the tax system and for deterrent purposes should be levied with substantial penal-

ties. Plaintiff's conduct falls within that proscribed by section 6702.

IT IS, THEREFORE, ORDERED that defendant's motion to dismiss or for summary judgment be, and the same hereby is, GRANTED.

Judgment will be entered accordingly.

s/Hiram H. Ward
United States District
Judge

December 17, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

DEBORAH GIBBS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C-84-849-D
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

This matter comes before the Court on defendant's Motion to Dismiss or for Summary Judgment and for Attorney's Fees (February 12, 1985). Plaintiff opposes the motion but, in light of this Court's dismissal of McKee v. United States, C-84-677-G, (M.D.N.C. December 17, 1984), states that resistance to the motion would be futile. Plaintiff's Response to Defendant's Motion to Dismiss (February 14, 1985). The Court will grant the motion to dismiss but deny the request

for attorney's fees.

Plaintiff filed her 1983 Form 1040 Individual Income Tax Return on April 15, 1984. Declaration of Robert L. Welsh, Exhibit A (February 12, 1985)(hereafter Form 1040, line _____). On line 48 of the tax return plaintiff claimed a tax credit in the amount of $248.80 for "CMTC Escrow Account." This credit reduced the assessment of plaintiff's total annual tax and consequently increased her representations of the amounts of tax overpayment and refund due. Form 1040, lines 56, 65 & 66. Plaintiff attached a letter to her return which stated that religious beliefs made it unconscionable for her to "participate financially in such acts as the placement of nuclear weapons in Europe, 'covert' aid to Central America, and military adventures worldwide."

Plaintiff explained:

> On line 48 of my tax return I have requested that 40% of my tax obligation, representing the proportion of the budget given to current military expenditures, be returned to me so that it can be deposited in the Conscience and Military Tax Campaign Escrow Account for a World Peace Tax Fund. Deposits are held in this fund pending legislative action creating a legal means for taxes to be directed only to activities which respect and enhance life.

Plaintiff stated she was not attempting to avoid tax liability but was only trying to meet her tax obligation without violating religious beliefs. Welsh Declaration, Exhibit A at 4.

The Internal Revenue Service (I.R.S.) assessed a $500 penalty against plaintiff pursuant to 26 U.S.C. Sec. 6702. Plaintiff paid fifteen percent of the penalty and filed a claim for refund of that amount and abatement of the

penalty. The I.R.S. disallowed this request, and plaintiff filed this action claiming that the collection of the penalty and refusal to refund it were "unconstitutional, unlawful, and unreasonable." Complaint, par. 10 (September 4, 1984).

Section 6702 of Title 26 of the United States Code provides, inter alia, that an individual who, because of a "frivolous" position, files a tax return containing information that on its face indicates a substantially incorrect self-assessment "shall pay a penalty of $500." The legislative history of the statute indicates that the Congressional purpose behind the statute was to deter the filing of protest tax returns, including tax returns showing a tax reduced by an estimate of the amount of taxes

going to the nation's defense department, and to maintain the integrity of the income tax system. S.Rep.No. 494, 97th Cong., 2d Sess. 277-78, reprinted in 1982 U.S.Code Cong. & Ad. News 781, 1023-24). [6]

The "CMTC Escrow Acct." tax credit on line 48 is information indicating that the self-assessment on the return is substantially incorrect within the meaning of 26 U.S.C. Sec. 6702(a)(1)(B). It reduces the crucial assessment of the tax return, line 56 which represents the total annual tax obligation, and renders lines 49, 65 and 66 incorrect as well. The letter attached to plaintiff's return

---

[6] A more detailed review of the legislative history of this statute and the income tax reporting system which it compliments is presented in McKee v. United States, C-84-677-G (M.D.N.C. 1984).

does not remedy the incorrect assessments on the face of the return. While a taxpayer may send a letter to the I.R.S. along with a return as plaintiff did, such a letter is not a part of, or a supplement to, the return. Drefchinski v. Regan, 589 F.Supp. 1516, 1522 (W.D. La. 1984).[7]

The incorrect self-assessment was due to a "frivolous" position within the meaning of section 6702(a)(2)(A). A tax credit, like a deduction is solely a matter of legislative grace and may not be taken without Congressional authori-

---

7 The question of the substantial correctness in McKee v. United States was closer than it is in the instant case because Ms. McKee netted out her unallowable tax credit, albeit in an irregular fashion, on the face of the return. The Court found, however, that even entry of the correct refund amount did not remove the return from the scope of the statute.

ty. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 54 S.Ct. 788, 78 L.Ed. 1348 (1934); Randall v. Commissioner, 733 F.2d 1565 (11th Cir. 1984). It is settled law that a taxpayer may not reduce his or her taxes by an amount believed to be used by the government for military purposes. Lull v. Commissioner, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); see United States v. Lee, 455 U.S. 252,, 260, 102 S.Ct. 1051, ____, 71 L.Ed.2d 127, 134 (1982) (tax system could not function if persons could challenge tax payments which support war-related activities on religious grounds). Diversion of tax revenue out of the United States Treasury for deposit in a "CMTC Escrow Acct." is clearly an adjustment of tax liability not authorized by Congress and, therefore, is

"frivolous" under section 6702(a)(2)(A).[8]

Plaintiff contends that her conduct is protected by the first amendment freedom of expression and right to petition the government for redress of grievances. The first amendment freedom of expression is not absolute. Breard v. City of Alexandria, 341 U.S. 622, 642, 71 S.Ct. 920, ____, 95 L.Ed. 1233, 1248 (1951). Regulation of speech is justified if it furthers an important or substantial governmental interest which

---

[8] It is important to note that neither the government nor the Court challenges the sincerity of plaintiff's religious or moral beliefs or has labelled the holding of those beliefs frivolous. However, Congress has deemed it appropriate to penalize the assertion of frivolous income tax positions, i.e., deductions, credits, or other adjustments on tax returns which have no legal basis in the tax law. The Court is bound to enforce the law against those whose conduct it prohibits, and plaintiff's conduct falls within the scope of the statutory penalty.

is unrelated to the suppression of free speech and if the incidental restriction of speech is no greater than is essential to furtherance of that interest. United States v. O'Brien, 391 U.S 367, 377, 88 S.Ct. 1673, ____, 20 L.Ed.2d 672, 680 (1968). Even if the plaintiff's conduct is protected first amendment activity, its restriction is within constitutional limits. The governmental interest in preserving the integrity of the income tax collection system is obviously important and substantial. Section 6702 is narrowly drawn in furtherance of that interest. The statute does not unconstitutionally abridge a taxpayer's right to petition the government for it penalizes only the noncommunicative aspect of a taxpayer's conduct which threatens the integrity of the tax system and does not

deprive a taxpayer of reasonable, and likely more effective, alternative means of expression. Drefchinski v. Regan, 589 F.Supp. at 1526-27; Scull v. United States, 585 F.Supp. 956, 961 (E.D.Va. 1984); Ueckert v. United States, 581 F.Supp. 1262, 1266 (D.N.D. 1984); Franklet v. United States, 578 F.Supp. 1552, 1556-57 (N.D.Calif. 1984). A taxpayer remains free, as plaintiff did here, to express objection to military expenditures in a letter attached to the tax return and to petition the legislative branch of government which directs military spending and which enacted section 6702.

Although the Court agrees with the government that plaintiff's conduct justified the section 6702 penalty, it cannot find plaintiff's challenge to the

statute and its application is made in "bad faith." Consequently, an award of attorney's fees to the government is not appropriate.[9]

IT IS, THEREFORE, ORDERED that defendant's motion to dismiss or for summary judgment be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that defendant's motion for attorney's fees be, and the same hereby is, DENIED.

A Judgment will be entered accordingly.

s/Hiram H. Ward
United States District Judge

February 26, 1985

---

[9] Appellate resolution of the issues raised in this case and/or in McKee v. United States will guide any motion for fees by the taxpayer or the government raised in similar cases which might be brought in the future.